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No. 484

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ALLSTATE INSURANCE COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY; NATIONWIDE MUTUAL INSURANCE COMPANY; NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Petitioners,*

v.

EDWIN S. LANIER, Commissioner of Insurance for the State of North Carolina; T. WADE BRUTON, Attorney General for the State of North Carolina,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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EDWIN S. LANIER, Commissioner of Insurance for the State of North Carolina; T. WADE BRUTON, Attorney General for the State of North Carolina,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit entered in this case on May 27, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals, set out in Appendix A, *infra,* pp. 1a-6a, is not yet officially re-

ported. The opinion and order of the District Court (Pet. App. 5a-36a)[1] are reported at 242 F. Supp. 73.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1966 (Appendix A, *infra*, p. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A North Carolina statute compels petitioners and all other automobile liability insurance companies desiring to do business in the state to combine in a mandatory rating bureau and to fix and maintain, without deviation, identical premium rates and other uniform conditions concerning the sale of automobile liability insurance. Petitioners challenged the constitutionality of this statute in the District Court, alleging that it is in conflict with and is, therefore, preempted by paramount federal law, as expressed in the Sherman Act (15 U.S.C. 1-7) and the McCarran-Ferguson Act (15 U.S.C. 1011-1015). Finding no such conflict, the District Court dismissed the complaint and the Court of Appeals affirmed. The question presented is whether, pursuant to the Supremacy Clause, the North Carolina mandatory rating bureau law is preempted and superseded by the Sherman and McCarran-Ferguson Acts.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article VI, Clause 2, of the United States Constitution, commonly known as the Supremacy Clause; and relevant provisions of the Act of July 2, 1890, 26 Stat.

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[1] "Pet. App." refers to the printed appendix filed by petitioners in the Court of Appeals.

209, as amended (15 U.S.C. 1-7), commonly known as the Sherman Act; the Act of March 9, 1945, 59 Stat. 33, as amended (15 U.S.C. 1011-1015), commonly known as the McCarran-Ferguson Act or Public Law 15; and the General Statutes of North Carolina (Sections 58-247, 58-248.2, as amended, 58-248.3, and 58-248.4) are set out in Appendix B, *infra*, pp. 1b-4b. See also Pet. App. 1a-4a.

STATEMENT

The facts are not in dispute. Petitioners are sellers of automobile liability insurance. They are known as "independent insurers," since, unlike so-called "bureau companies," they normally file "their rates, classifications and coverages independently of the rating bureau . . ." (Dist. Ct. Fdgs., Pet. App. 10a). As such, except in those few states which compel all insurers to adhere to bureau rates and policy forms, petitioners compete by charging "rates substantially below those promulgated by rating bureaus . . . [and by] developing new types of insurance coverage and new systems of classification" (Dist. Ct. Fdgs., Pet. App. 11a). The opportunity to compete in these ways is of unquestioned importance, for in the insurance industry "[t]he competition is not only in the form of policy and costs of premiums, but in the manner of policy coverage" (*ibid.*).

This case challenges a North Carolina statute that forecloses such competition by requiring uniformity in premium rates and in the type of insurance product offered to the public (N.C. Gen. Stats. §§ 58-246 to 248.8 (1965)). Under the challenged statute, all sellers of automobile liability insurance must belong to the rating bureau (§ 58-247) and must "conform to the

rates, rating plans, classifications, schedules, rules and standards made and filed by the rating bureau" (§ 58-248.2). "[T]here is no doubt that [petitioners'] policy of charging initial premium rates at an amount substantially lower than those charged by bureau companies" (Dist. Ct. Fdgs., Pet. App. 12a), as well as competitive innovation in the type of insurance protection offered to the public, are foreclosed by this statute.

On March 13, 1962, petitioners filed a complaint under the Declaratory Judgments Act (28 U.S.C. 2201-2202) seeking a declaration that the North Carolina statute conflicts with and is preempted by paramount federal law governing competition in the interstate insurance business (Pet. App. 38a-47a). Specifically, petitioners alleged that Congress, in the McCarran-Ferguson Act, created a regulatory scheme for the interstate insurance business which authorizes the states to permit insurers to join together in rating bureaus, provided there is effective regulation, but which preserves the right of insurers to act independently of their competitors if they choose to do so. The North Carolina statute, the complaint further alleged, irreconcilably conflicts with this federally-established scheme by forcing all automobile liability insurance sellers to belong to the rating bureau and to adhere, without deviation, to the rates, rating plans, schedules, etc., filed by such bureau. (Pet. App. 44a-46a.) In sum, it was petitioners' position that under controlling federal law they are free to formulate and file their rates, rating plans, schedules, etc., independently of the rating bureau, subject always to the "extensive state supervisory control" which the District Court found extends to all automobile liability insurers, "independents" as well as "bureau companies" (Dist. Ct. Fdgs., Pet. App. 10a).

On cross-motions for judgment on the pleadings, the District Court on May 31, 1965, rendered its "Opinion and Order," and on June 2, 1965, entered its Final Judgment dismissing the complaint (Pet. App. 5a-36a). The court noted that Congress had passed the McCarran-Ferguson Act in order to remove doubts as to the effectiveness of state regulation and taxation raised by this Court's decision in *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533 (1944) (Pet. App. 25a). The court further noted that in that Act Congress had affirmed the applicability of the federal antitrust laws to the business of insurance "to the extent that such business is not regulated by state law" (15 U.S.C. § 1012(b); Pet. App. 24a-25a), and by Section 3(b) had continued the Sherman Act with respect to acts or agreements of boycott, coercion, or intimidation regardless of the extent of state regulation (15 U.S.C. § 1013(b); *ibid.*).

The critical inquiry, as framed by the District Court, was whether North Carolina's mandatory rating bureau scheme is a "means of coercion and intimidation as contemplated by . . . Section 3(b) . . ." or, as defendants maintained, is permissible state regulation within the ambit of Section 2 (Pet. App. 26a). Relying particularly on this Court's decision in *Parker* v. *Brown,* 317 U.S. 341 (1943), the District Court held that Section 3(b) relates solely to *private* conduct of the type found in the *SEUA* case (Pet. App. 27a-32a). Hence, although petitioners are "compelled" and "coerced" to subscribe to rates and practices fixed by the North Carolina rating bureau, the court concluded that "any coercion and intimidation in that respect is asserted by the state" and is not barred by Section 3(b) which only "prevents the use of coercion and intimidation or boycott by agreement of private parties . . . [and] does

not refer to action by a State in the exercise of" its regulatory powers (Pet. App. 34a-35a).

In a brief opinion, the Court of Appeals affirmed. While it recognized that "the antitrust laws were made applicable by Section 2b to insurance companies," it noted that "the debates explicitly recognized the continuing vitality of *Parker* v. *Brown*" (App. A, *infra*, p. 5a). Ignoring any distinction between the *violation* of the Sherman Act alleged in the complaint in *Parker* v. *Brown* and the declaration of federal *preemption* sought by the petitioners in the present case,[2] the court stated "that since the rating bureau was established and administered under the active supervision of the State, it was not subject to attack under the federal antitrust laws, which condemn only *private* non-competitive activities" (App. A, *infra*, p. 2a; court's emphasis). The court concluded that the McCarran-Ferguson Act "did no more than clarify the boundaries of state and federal jurisdiction over the insurance business and in no wise sought to affect the substantive controlling principle of *Parker* v. *Brown*" (App. A, *infra*, p. 6a).

REASONS FOR GRANTING THE WRIT

This case presents an important and substantial question of first impression. At issue is the validity under the Supremacy Clause and the Sherman and McCarran-Ferguson Acts of state laws which purport to regulate the interstate insurance business by creating

[2] Indeed, as discussed below (*infra*, pp. 10-18), the Court of Appeals ignored all affirmative evidence manifesting the intent of Congress in enacting the McCarran-Ferguson Act to assure the economic liberty guaranteed by the Sherman Act for those in the interstate insurance business who choose to compete rather than combine in rating bureaus with their competitors.

mandatory insurance rating bureaus and outlawing price and other forms of competition. The Court of Appeals has erroneously held that the McCarran-Ferguson Act constitutes a virtually unlimited grant of power to the several states to regulate the multi-billion dollar insurance industry as they see fit, however conflicting or inconsistent such regulation may be with the paramount federal policy expressed in the antitrust laws. This Court should decide whether such an interpretation is correct.

1. The significance of this case reaches far beyond the particular North Carolina statute involved. If the decision below is allowed to stand, the way will be open for legislatures in every state to adopt, as to all lines of insurance, the rigid restraints on rate competition and product innovation admittedly imposed by the challenged North Carolina statute (Pet. App. 12a).

This problem was anticipated and dealt with by Congress more than 20 years ago during its consideration of the bill that ultimately became the McCarran-Ferguson Act. Protesting that this bill, weakened by House Committee amendments and by adverse language in previous committee reports, had resulted in "tremendous pressure upon State legislatures" for compulsory rating bureau statutes, the American Farm Bureau Federation urged the House Judiciary Committee to make clear by amendment or by appropriate language in its report, or both, that "it is not the intent or purpose of [the bill] to encourage such price-fixing and monopoly-forming legislation . . ." (91 Cong. Rec. 1088). Responding to this appeal, the House Judiciary Committee, in House Report 143, specifically stated that it was *not* the intent or desire of Congress to require or encourage the establishment

of compulsory rating bureaus. "Competitive rates on a sound financial basis," the Report declared, "are in the public interest" (H. Rep. 143, 79th Cong., 1st Sess., p. 3).[3]

This declaration of the congressional purpose to assure competitive rates, together with changes made in the bill,[4] forestalled the "tremendous pressure" for anticompetitive rating bureau laws cited to Congress by the American Farm Bureau Federation.[5] The decision below, however, is certain to revive that pressure. Plenary consideration by this Court is needed to clarify what has now become a substantial and unsettled issue

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[3] This was in sharp contrast to the previous reports referred to by the American Farm Bureau Federation which had advocated "uniformity in rates . . ." for the insurance industry and had declared that "competition in rates . . . should be discouraged and not encouraged" (H. Rep. 873, 78th Cong., 1st Sess., p. 9 (1943)).

[4] For example, Congress deleted from the bill the words "for the purpose of enabling adjustments to be made and legislation to be adopted by the several States and Congress" which, according to the American Farm Bureau Federation, had been "cited in some States as evidence that Congress expects the States to enact legislation presented by certain insurance groups and which, if adopted, would have the effect of eliminating competitive rates" (91 Cong. Rec. 1088).

[5] Only North Carolina and two other states require uniform rates for automobile liability insurance. See Massachusetts Anno. Laws, Chap. 17, Sec. 113B and Texas Ins. Code, Art. 5.01. In addition, mandatory bureau membership, but not rate uniformity, is required for fire insurance in the District of Columbia (D.C. Code, § 35-1404), Louisiana (La. Rev. Stats., Sec. 22-1405), Mississippi (Miss. Code, Sec. 5817, 5826), North Carolina (N.C. Gen. Stats., Sec. 58-127), and for fire and automobile liability insurance in Virginia (Va. Code, Sections 38.1-227 and 38-249). Approximately a dozen states require bureau membership and rate uniformity in the workmen's compensation field (Respondent's Appendix 12b-15b).

in the field of federal-state economic regulation of the insurance industry.

2. This case also merits review because its presents for the first time important questions as to the meaning of the McCarran-Ferguson Act. By that Act, as this Court has held, Congress "put the full weight of its power behind existing and future state legislation . . ., *subject only to the exceptions expressly provided for.*" *Prudential Insurance Company* v. *Benjamin*, 328 U.S. 408, 431 (1946) (emphasis added). This case involves the important exceptions embodied in Sections 2(b) and 3(b) of the Act by which Congress undertook to chart the future relationship of federal and state authority regarding competition in the interstate insurance business. The issue raised is whether these provisions prohibit state-coerced uniformity in insurance rates and practices, or whether, as the lower courts have held, they give the states carte blanche to force insurers to combine with their competitors in state insurance monopolies.

Critical to a proper resolution of this issue is an analysis of the relationship between Section 2(b), which provides that the federal antitrust laws shall remain applicable to the business of insurance "to the extent such business is not regulated by State law," and Section 3(b), which provides that notwithstanding the extent of state regulation the Sherman Act shall remain supreme with respect to such nonconsensual matters as "boycott, coercion, or intimidation." Petitioners have maintained that an interpretation restricting the proscriptions of Section 3(b) to unregulated private conduct as found in the *SEUA* case (see District Court Opinion, Pet. App. 21a, 25a-26a, 32a), renders that obviously important provision of the Act

completely meaningless and redundant to Section 2(b) since the latter provision specifically retains, *pro tanto,* the applicability of all the federal antitrust laws to any form of private, unregulated anticompetitive conduct, including "boycott, coercion, or intimidation."

The Court of Appeals, though acknowledging that "the antitrust laws were made applicable by section 2b to insurance companies . . ." (App. A, *infra,* p. 5a), inexplicably did not even cite the crucial Section 3(b). It thus made no attempt to answer petitioners' argument that the only way to give real meaning to Section 3(b) is an interpretation, comporting fully with the intent of Congress in enacting the McCarran-Ferguson Act (*infra,* pp. 11-17), that Section 2(b) authorizes the states to *permit* regulated cooperation among competitors that otherwise would violate the antitrust laws, while Section 3(b), construed as a comprehensive prohibition of both state and private coercion, assures the right to compete for those desiring to operate independently of their competitors.[6]

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[6] That Section 3(b) was intended to preclude as permissible state "regulation" under Section 2 the establishment of mandatory rating bureaus and the elimination of rate competition is supported by the explicit declaration of Congress that "[c]ompetitive rates on a sound financial basis are in the public interest" (H. Rep. 143, *supra,* p. 3). See Brainard and Dirlam, *Antitrust, Regulation, and the Insurance Industry: A Study in Polarity,* Antitrust Bulletin (Economics Issue), Vol. XI, Nos. 1 and 2 (January-April, 1966), pp. 251-252, 255-256. Moreover, the "boycott, coercion, or intimidation" proscribed in Section 3(b) does not occur in a vacuum. The purpose of such conduct, as in *SEUA* itself from which the language is taken, is almost invariably to gain adherence to uniform prices. If identical rates may be achieved through state-imposed uniformity, there, of course, would be no need for *private* "boycott, coercion, or intimidation." It was precisely this possibility of which the American Farm Bureau Federation complained. See 91 Cong. Rec. 1088.

3. In their brief in the Court of Appeals, petitioners detailed extensive and decisive evidence, gleaned both from the face of the McCarran-Ferguson Act itself and the context of its enactment and implementation, establishing the intent of Congress to bar state-coerced uniformity with respect to such matters as rates, coverage, and policy forms. Without exception, the Court of Appeals has simply ignored this evidence, as did the District Court before it.[7]

Petitioners' position that Section 3(b) must be construed as a bar to state as well as private acts of coercion finds strong support in a statement by Senator Revercomb, a member of the Senate Judiciary Committee that studied the bill. Senator Revercomb explained to the Senate that the bill (91 Cong. Rec. 487; emphasis added):

> has as its purpose giving to the States the control of insurance and creating a moratorium, so-called, with respect to the Sherman Act and the Clayton Act, . . . and then it provides that nothing con-

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[7] The District Court, however, did mention the Report prepared by the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, issued following extensive hearings on the insurance industry in 1959 (S. Rep. 831, 87th Cong., 1st Sess.), where it was unanimously concluded (pp. 77-78):

> It is clear that section 3(b) means that State regulation under Public Law 15 may not abridge the protection from coercion, boycott, or intimidation afforded by the Sherman Act. The requirement of several State statutes for mandatory bureau membership substantially lessens competition and appears to be in conflict with the McCarran Act. . . . The McCarran Act can certainly not be viewed as justifying the acts of States in compelling all insurers to be members of rating bureaus or requiring that all rates be uniform by legislative fiat.

The District Court found this Report "informative and worthy of consideration" but "not controlling . . ." (Pet. App. 30a).

> tained in this measure shall render the Sherman Act inapplicable if any agreement *or act of the State* or an insurance company *under a law of the State creates a boycott, coercion, or intimidation.*

This authoritative definition of Section 3(b) was not contradicted or even questioned by any other spokesman during the debates, or by any committee report.[8] More importantly, this definition of Section 3(b) as a bar to *state* coercion is necessary in order to effectuate the compromise embodied in Public Law 15.

(a) The Legislative History

The distinction between voluntary or permissive cooperation among competitors, to which Congress acquiesced, and mandatory or coerced adherence to jointly-set rates and practices, which was to be disallowed, permeates the legislative history. Public Law 15 originated in a compromise proposal submitted by the National Association of Insurance Commissioners (NAIC) which was predicated on this crucial distinction. As stated in a memorandum accompanying the NAIC proposal, following a proposed moratorium period:

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[8] Senator Ferguson, one of the sponsors of the legislation, likewise recognized that Section 3(b) was intended to operate as a limitation on the kind of regulatory program the states could adopt. "In other words," he stated (91 Cong. Rec. 1481; emphasis added):

> under the terms of the bill, there are six things on which a *State could not legislate.* They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate.

Neither the District Court nor the Court of Appeals referred to these authoritative statements of Senators Revercomb and Ferguson.

> The Sherman Act shall not apply to the use of the cooperative rates, forms, and underwriting plans where state approved . . . nor to cooperative action for making of rates, rules, or plans *where their use is not mandatory.* (90 Cong. Rec. Appendix 4403-08; emphasis added).

The same emphasis upon permissive, as opposed to mandatory, combinations is found, at least by clear implication, in the committee reports. Certainly, it would have been anomalous for Congress to espouse "competitive rates," as it did in the authoritative House Report 143, *supra*,[9] if it intended to authorize all 48 states to "regulate" by abolishing rate competition. Furthermore, the committee reports stated that during the antitrust moratorium provided for by the bill, "opportunity will have been granted for the States to *permit* agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts."[10] Had the committees intended to authorize compulsory rating bureaus, the Reports could have easily declared that "opportunity will have been granted for the States to *permit or require*" participation in such combinations. But this was not the intent of Congress.

While it was uniformly recognized in the debates that rating bureaus would be permitted, it was assumed that insurers would decide for themselves whether or

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[9] See *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 413 (1953).

[10] S. Rep. 20, 79th Cong., 1st Sess., p. 2 (emphasis added); H. Rep. 68, 79th Cong., 1st Sess., p. 3; H. Rep. 143, 79th Cong., 1st Sess., p. 3.

not to participate.[11] As stated by Senator Radcliffe, an active sponsor of the bill, and a spokesman for the administration (91 Cong. Rec. 1483):

> In regard to the rating bureaus, I may say that some companies utilize them and some do not under existing laws and regulations.
>
> * * *
>
> Whether a new or old company desires to go under a rating bureau or not will be decided by its management. I do not believe that it is necessary for us at this time to assume that the States will run out on their obligations and treat the act as waste paper.

Finally, Senator O'Mahoney, "one of the principal architects of the McCarran Act" (S. Rep. 831, 87th Cong., 1st Sess., p. iii (1961)) and a Senate conferee, summed up the Act's objectives as follows (91 Cong. Rec. Appendix A 1626):

> The new law amounts to an invitation to the States and to the insurance industry to work out in good faith a system of State regulation in the public interest which shall be free from restrictive monopolistic practices *although allowing cooperative effort* among insurance companies that may be necessary to maintain their solvency... (emphasis added).

The words "allowing cooperative effort" express the true sense of Congress' purpose; and these words, like

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[11] Senator Ferguson's reference to the District of Columbia mandatory fire insurance rating bureau, on which the Court of Appeals placed great stress, is not to the contrary. Senator Ferguson was not referring to its mandatory membership feature, but was merely responding to Senator Pepper's question (91 Cong. Rec. 1481) whether a state could provide that companies "may belong to a rating bureau . . ."

the words, "contracts or agreements" with which this Court was concerned in *Schwegmann Bros.* v. *Calvert Distilleries Corp.*, 341 U.S. 384, 388 (1957), "convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing." [12]

(b) The Contemporaneous Construction of the Act

This Court has held that the contemporaneous construction of a statute by those who initiated its enactment and were later responsible for setting its machinery in motion is "entitled to great weight." *United States* v. *American Trucking Associations*, 310 U.S. 534, 549 (1940). In this case, the men who initiated Public Law 15, and after its enactment undertook to implement its provisions, were a committee of the National Association of Insurance Commissioners. These men prepared the original draft of the bill, and thereafter met with representatives of the insurance industry and with members of Congress for the purpose of "working out this compromise" (91 Cong. Rec. 1487).[13] After Public Law 15 was enacted, this

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[12] Some years later in the course of hearings on the insurance industry which he conducted, Senator O'Mahoney reiterated his understanding that the purpose of Congress in enacting the McCarran Act was to authorize the states to regulate, subject, however, to the condition "that the states did actually regulate the insurance industry *so that there would be independence of action* . . ." ("The Insurance Industry," Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 86th Cong., 1st Sess., pp. 1141-42 (emphasis added)).

[13] As Senator Barkley observed, the bill "was largely worked out by a conference of insurance commissioners who represent the people of the States and who did not take the viewpoint . . . expressed by the insurance companies, namely to instigate certain legislation in an effort to anticipate the decision of the Supreme Court [in *SEUA*] and to make it nugatory" (91 Cong. Rec. 1488).

identical committee (Pet. App. 58a), together with representatives of the insurance industry, drafted model state regulation intended to implement the purposes of the McCarran-Ferguson Act. In a memorandum accompanying the model statute, the NAIC committee declared that the language and legislative history of Public Law 15 indicated "quite plainly that Congress was willing to permit co-operative action, including price fixing, . . . and *at the same time was interested in seeing to it that reasonable competition was preserved*" (Pet. App. 95a; emphasis added). To effectuate this dual purpose, the rate-making section of the model bill provided that "uniformity among insurers in any matter within the scope of this Section is neither required nor prohibited" (Pet. App. 114a). As the NAIC committee explained, this provision was inserted in order to preserve "freedom of action upon the part of those who desire to take action independently" (Pet. App. 96a). In addition, the model act expressly provided "that nothing contained in this Act shall be construed as requiring any insurer to become a member of or a subscriber to any rating organization" (Pet. App. 115a). In sum, as a prominent member of the NAIC drafting committee observed, the drafters of the model bill "never lost sight for a moment of the congressional mandate that full opportunity for price competition should be provided and that independence of action for those who wanted it should be guaranteed" (Pet. App. 181).

Neither the District Court nor the Court of Appeals has even considered this authoritative evidence of the intent of Congress.

(c) Insurance Regulation for the District of Columbia

In May 1948, within the moratorium period, Congress enacted implementing legislation for the District of Columbia in the casualty insurance field (35 D.C. Code 1501, *et seq.*). The purpose of this legislation, as stated in the Senate Committee Report, was "to provide for the District of Columbia regulation contemplated by Public Law 15 with respect to that part of the business of insurance which is within the scope of the bill" (S. Rep. 1038, 80th Cong., 2d Sess., p. 3). Examination of the bill makes clear that Congress' understanding of the "regulation contemplated by Public Law 15" is in accord with that of the NAIC committee and confirms petitioners' contentions in this case. Thus, the District of Columbia statute expressly provides that nothing therein shall "be construed to require uniformity in insurance rates, classifications, rating plans, or practices" (35 D.C. Code 1503 (d)), and, while permitting voluntary cooperation, further provides that "no company shall be required . . . to be a member or subscriber of any rating organization" (35 D.C. Code 1505). This evidence was disregarded by the courts below.[14]

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[14] Both courts, however, adverted to a mandatory fire insurance rating bureau law passed by Congress for the District of Columbia in the session of Congress before the McCarran Act was passed (Pet. App. 26a-27a; App. A, *infra*, p. 5a). It must be emphasized, however, that congressional thinking on the subject of competition in the insurance business underwent a sharp change in the course of considering Public Law 15 (see note 3, *supra*), and that the District of Columbia fire rating bureau law permits deviation in rates. In any event, the 1948 action of Congress in implementation of the McCarran-Ferguson Act is obviously far more authoritative as to congressional understanding of its purpose than legislation adopted nearly a year before the Act was passed.

4. The Court of Appeals ignored the substantial and significant items of legislative history enumerated above because of its apparent belief that Congress in enacting the McCarran-Ferguson Act intended merely to codify the principle of the case of *Parker* v. *Brown*, 317 U.S. 341 (1943). But the "vitality" of *Parker* v. *Brown*" (App. A, *infra*, p. 5a) as authority for state-supervised mandatory rating bureaus in the interstate insurance business has been completely destroyed by the legislative history of the McCarran-Ferguson Act and the context of its enactment, matters specifically indicating an intent to curtail state power which this Court was unable to find in the history of the Sherman Act alone in *Parker* v. *Brown*. See 317 U.S. at 351.

Moreover, as this Court made clear in *Parker* (317 U.S. at 348-49), no claim was made there that the California raisin proration program conflicted with and therefore was preempted and superseded by the Sherman Act pursuant to the Supremacy Clause. Instead, the bill of complaint alleged that the state through its agricultural marketing personnel had combined and conspired with Brown's competitors in *violation* of the Sherman Act. In accordance with settled doctrine, this Court merely held that a state could not *violate* the Sherman Act. In the present case, however, it has never been alleged that North Carolina has violated the Sherman Act, but that its statute is in irreconcilable conflict with overriding federal legislation.

The distinction between *violation* and *preemption* is more than semantical. "The distinctive operations of the [state and national] governments within their respective spheres is basic to our federal constitutional

system, howsoever complicated and difficult the practical accommodations to it may be" (*Feldman* v. *United States*, 322 U.S. 487, at 490-91 (1944)). The difficulties inherent in accommodating the competing and often conflicting objectives of the two governments would most surely be compounded if the states and their officials could act in the area of economic regulation only at the peril of liability for violating some federal law dealing with the same subject matter. Policy considerations in a system of dual sovereigns dictate that the officials of either government, while carrying out their duly and lawfully assigned governmental tasks, may not be held guilty of a *violation* of the law of the other and therefore subject to its sanctions. Reaffirmation in *Parker* v. *Brown* of the settled principle that a state and its officials may not be charged with a violation of the Sherman Act appears wholly unexceptional and does not mean that state economic regulation may never be preempted by the Sherman Act.[15]

Indeed, the limitations of *Parker* v. *Brown* in a preemption context were made clear in the *SEUA* decision itself. Mr. Chief Justice Stone (who wrote the opinion in *Parker* v. *Brown*) dissented in *SEUA* on the ground, *inter alia*, that (322 U.S. at 581):

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[15] The sweeping interpretation of *Parker* v. *Brown* by the court below that an anticompetitive regulatory program of a state can never be preempted by the federal antitrust laws so long as such a program is "established and actively supervised by [the] State" (App. A, *infra*, p. 4a) could have a substantial impact in a number of industries in addition to insurance. Compare, *e.g.*, *Asheville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission*, 263 F. 2d 502 (4th Cir. 1959); *United States* v. *Utah Pharmaceutical Association*, 201 F. Supp. 29, 33 (D. Utah 1962), aff'd *per curiam* 371 U.S. 24 (1962). This expansive interpretation of *Parker* v. *Brown* provides a separate ground for review by this Court.

> The Government admits that [the insurance] statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act and the argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act.

If, as both the District Court and the Court of Appeals in the present case apparently assumed, *Parker* v. *Brown* precludes preemption by the Sherman Act of conflicting state regulatory laws, its author surely would have perceived it and would not have dissented in the *SEUA* case on the ground that the Sherman Act would invalidate an extensive system of state regulation.[16] In this connection, it is significant that Congress rejected the position of the Department of Justice that *Parker* v. *Brown* obviated the necessity of enacting legislation to preserve state insurance regulation, pointing out that the state regulation involved in that case was "in conformity with, if not supplementary to, a Federal statute," whereas "[o]bviously, all

[16] The five statutes which the Government admitted would be invalidated appeared merely to authorize private insurers to establish and maintain uniform rates without state supervision or regulation (Brief of the United States, p. 129, Records and Briefs in United States Cases (Supreme Court), Vol. 73, Oct. Term). The statement of Mr. Chief Justice Stone, however, was not limited to these five statutes but included "many others" as well. These other statutes surely included that of Virginia, which, like the North Carolina statute at issue here, made bureau membership mandatory and required uniform rates subject to approval by the Insurance Commissioner. This is the case because (1) the Virginia statute was the subject of more discussion at the oral argument (to which Chief Justice Stone specifically referred) than all the other state laws combined (*id.*, Oral Argument); and (2) the State of Virginia itself admitted in an *amicus* brief that its statute *did* conflict with the Sherman Act and would be superseded and preempted if the Act were held applicable to insurance (*id.*, Brief of the Commonwealth of Virginia, *Amicus Curiae*, p. 9).

State regulation concerning insurance does not and would not fall in such a category" (H. Rep. 873, 78th Cong., 1st Sess., at p. 7).

Thus, as both Chief Justice Stone and the Congress itself realized, there is grave doubt whether North Carolina's compulsory rate-fixing statute could have survived an attack under the Supremacy Clause even if Congress had not enacted the McCarran-Ferguson Act. That Act, however, eliminates all doubt, for, as shown above, it was the clear intent of Congress to withhold from the states authority to divest by regulation the right of insurers to take independent competitive action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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